

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1876

Cir. Ct. No. 2012SC135

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DIDION, INC.,

PLAINTIFF-APPELLANT,

V.

MERLIN HAUSER AND JOE HAUSER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Didion, Inc., appeals a judgment dismissing its small claims action against Merlin Hauser and Joe Hauser after a fact-finding

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a)(2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

hearing. Didion argues the circuit court erred in concluding it did not have an enforceable contract with the Hausers for the purchase of corn. I affirm.

BACKGROUND

¶2 Didion, a grain merchant, brought a small claims action against Merlin Hauser and his son, Joe Hauser (collectively the Hausers), to recover for damages Didion claimed to have sustained as a result of the Hauser's breach of contract. Didion alleged that on August 27, 2010, the Hausers, who are farmers, entered into an oral contract with Didion to deliver to Didion 8,000 bushels of corn at \$4.05 per bushel in January 2011, and that a document confirming the agreement was mailed to the Hausers on or about August 27, 2010. Attached to the complaint was a copy of the document confirming the agreement. The document, which was dated August 27, identified only Merlin as a party to the contract, and stated that it was "[s]ubject to the NATIONAL GRAIN & FEED TRADE RULES" and that "[a]ll disputes arising from [the] contract will be governed by the National Grain & Feed Association (NGFA) trade rules." The document also contained two signature lines—one for Didion and another line with the following language below it: "Accepted by" and "Please sign and return one copy." A representative of Didion signed on the line identified for Didion's signature; however, it is undisputed that Merlin neither signed the document nor returned it to Didion. Didion alleged that the Hausers failed to deliver the corn as contracted and sought damages it alleged to have suffered from the Hauser's

breach, less \$4,537.17, which was the value of corn delivered to Didion in March 2011 by “Hauser.”²

¶3 Joe answered that neither he nor his father had entered into a contract with Didion for the delivery of 8,000 bushels of corn in January 2011, and sought dismissal of Didion’s complaint. Joe averred that he had discussed with Didion the possibility of Merlin selling 8,000 bushels of corn to Didion, but that he had only asked for the price Didion was willing to purchase at and that he did not have authority to sell Merlin’s corn. Joe averred that on October 19, 2010, Merlin received the confirmation document from Didion, which was dated August 27, 2010, and attached as exhibits the document and the dated envelope it was mailed in. The signature on this document differs from the signature on the confirmation document attached to Didion’s complaint. In addition, Joe counterclaimed for \$4,537.17, which he claimed was owed to him by Didion for the delivery of corn which was part of a separate contract between Didion and him.

¶4 Following an evidentiary hearing, the circuit court entered a judgment in favor of the Hausers. The court found that Didion “did not have a legally enforceable contract with Merlin” and dismissed Didion’s complaint. With respect to Joe’s counterclaim, the court found that Didion had a contract with Joe and entered judgment in favor of Joe in the amount of \$4,537.17. Didion appeals.

² Didion’s small claims complaint does not identify whether the “Hauser” referred to was Merlin or Joe.

DISCUSSION

¶5 Didion contends the circuit court erred in dismissing its complaint without properly determining whether the parties had an enforceable contract despite the absence of a written agreement.

¶6 Under the “statute of frauds,” contracts for the sale of goods for \$500 or more are not enforceable unless they are evidenced by “some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the party’s authorized agent or broker.” WIS. STAT. § 402.201(1). However, there is an exception to the signed writing requirement when both contracting parties are merchants. *See* § 402.201(2). Subsection (2) provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of sub.(1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

Thus, if the transaction is “*between merchants*,” the “sending of a written confirmation within a reasonable time is sufficient to make enforceable an oral contract [] even though the requirements of the statute of frauds have not been satisfied.” *Harvest States Cooperatives v. Anderson*, 217 Wis. 2d 154, 158, 577 N.W.2d 381 (Ct. App. 1998) (quoted source omitted).

¶7 Didion argues that the circuit court erred in failing to “permit either party to put on evidence” relevant to the question of whether the Hauser’s were “merchants” within the meaning of WIS. STAT. § 402.201(2) and further that the court erred in failing to make determinations as to whether the Hauser’s were merchants, and whether Didion sent the Hauser’s a “written confirmation” of the

agreement in a “reasonable time.” Didion argues that because the court failed to consider whether the merchant exception to the statute of frauds applied in this case, this court should reverse the judgment and remand with directions that the court consider evidence pertaining to that issue and make findings accordingly. However, Didion failed to raise these issues before the circuit court, and I decline to address them now. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (“The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.”).

¶8 Didion argues that its “trial court counsel raised general issues regarding exceptions to the statute[] of frauds” and that counsel “refer[ed] generally to the exceptions to the statute of frauds and to the National Grain and Feed Association [] rules.” However, I have found no such “general[]” reference. Didion notes that its trial counsel stated to the court, “I’m not sure that the rules require a countersigned agreement from the seller under the –.” However, it is not clear to this court what counsel was referring to. Didion also states that counsel was “cut off by the court” and that the “court was not entertaining a review of specific federal or state law.” However, the record does not support the determination that counsel was prevented from raising any issues related to its claim on appeal that the WIS. STAT. § 402.202(2) exception to the statute of frauds applies in this case.

¶9 Accordingly, I affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

